

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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KENNETH JONES a.k.a.  
MILLARD SHANNON a.k.a  
JAMES JACOBS,

96 CV 5484

Petitioner,

MEMORANDUM

AND

-against-

ORDER

WILLIAM FRASER, WARDEN OF J.A.T.C,

Respondent.

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KENNETH JONES  
# 349-96-07982  
J.A.T.C.  
14-14 Hazen Street  
East Elmhurst, New York 11370

ZACHARY W. CARTER  
United States Attorney  
(Janice Innis-Thompson, Sharon Gervasoni, of  
counsel)  
Eastern District of New York  
Brooklyn, New York  
for respondent.

NICKERSON, District Judge:

Petitioner pro se filed this petition on November  
6, 1996 for issuance of a writ of habeas corpus

clm

pursuant to 28 U.S.C. § 2254, arguing that his parole should not have been revoked. Because petitioner challenges the execution of his sentence, his petition is properly brought pursuant to 28 U.S.C. § 2241. See Chambers v. United States, 106 F.3d 472, 474 (2d Cir. 1997).

On September 8, 1976, petitioner was sentenced by the United States District Court for the Eastern District of Michigan to an eight-year term of imprisonment followed by a three-year term of special parole for possession with intent to distribute heroin.

On December 7, 1980 petitioner was paroled. At that time, his ordinary term of parole was scheduled to end on April 12, 1984. At the conclusion of petitioner's ordinary term of parole, petitioner was required to serve a three-year special term of parole through April 11, 1987. During the term of his parole, petitioner was prohibited from violating any laws, using excessive amounts of alcohol, using drugs, and possession a firearm. He was also required, among other things, to notify his probation officer of any

change in his address, and to remain within the limits of the Southern District of New York.

On June 24, 1983, during petitioner's ordinary term of parole, the Parole Commission (the Commission) issued a warrant charging petitioner with violating the conditions of his parole based on: (1) a February 24, 1983 arrest in New York City for possession of a weapon; (2) an April 19, 1983 arrest in Queens for possession of stolen property, speeding, and marijuana possession; (3) failure to appear in Manhattan Supreme Court on June 2, 1983 for the February 24, 1983 charge; (4) failure to report to his probation officer since May 24, 1983; and (5) leaving his last known address on May 31, 1983 without reporting his new address to the Commission. At the time the warrant was issued, petitioner's whereabouts were unknown. The Commission instructed the United States Marshal Service to arrest petitioner, or, if petitioner was already in the custody of state or federal authorities, to place the warrant as a detainer.

The Commission supplemented the warrant on May 15, 1984, stating that petitioner had pled guilty to theft on September 29, 1983 in Hennepin County, Minnesota, and was arrested in Brooklyn, New York on February 9, 1984 for criminal possession of stolen property and criminal possession of a forged instrument, at which time he attempted to bribe the arresting officer to release him from custody. On February 20, 1985 the Commission filed a second supplement to the warrant, noting that petitioner had been convicted on January 10, 1985 of possession of a dangerous weapon, and was sentenced to a term of 3 and one-half to 7 years. The warrant was supplemented again on July 15, 1985 because petitioner was convicted in Manhattan Supreme Court on March 1, 1985 for bribery, criminal possession of a forged instrument, and criminal possession of stolen property. He was also convicted in the same court on April 4, 1985 for bail jumping. Because petitioner was in the custody of the New York City Department of Corrections for these charges, the Parole Warrant was lodged as a detainer against petitioner.

The Commission reviewed the detainer in December of 1985. By letter dated February 12, 1986, the Commission informed the petitioner that his parole violation warrant was to remain in effect as a detainer, and that he would be scheduled for an in-person dispositional revocation hearing during September of 1986. Petitioner refused to participate in the hearing, so the hearing was not held and petitioner's right to a hearing was waived.

Petitioner completed his state sentence on July 23, 1992. He was immediately taken into custody by the U.S. Marshals pursuant to the Commissioner's warrant. The Commission scheduled a revocation hearing for petitioner in October of 1992. Once again, petitioner refused to participate in the hearing. The hearing was conducted in absentia. On November 21, 1992, the Commission revoked petitioner's parole based on the violations listed in the warrant. The Commission also ordered that petitioner receive no credit for time spent on parole. Petitioner was required to serve the

time remaining on his original sentence by the Michigan Court, less any good time he would accumulate.

Petitioner was mandatorily released from his sentence on October 28, 1994, and was ordered to remain under supervision "as if on parole" pursuant to 18 U.S.C. § 4164 until May 31, 1995. The three-year special parole term which petitioner had received in 1980, and which he had not yet served, was then scheduled to commence and would run until May 31, 1998.

On April 1, 1995 petitioner was arrested and charged with criminal impersonation, criminal possession of a controlled substance in the 7<sup>th</sup> degree, and criminal possession of marijuana in the 5<sup>th</sup> degree. He was convicted of these charges in April of 1996 in state court and sentenced to a two-year term of imprisonment.

On November 6, 1995 the Commission issued a warrant charging petitioner with violating the conditions of special parole by using dangerous drugs, violating his special drug aftercare condition of supervision, and failing to report to his probation

officer. These charges were, in part, based on the activities for which petitioner was later convicted in April of 1996.

Petitioner completed his state sentence in August of 1997. The Commissioner's warrant was executed on August 3, 1997, and petitioner was taken into federal custody. A preliminary interview was held on August 5, 1997. On April 21, 1998, the Commission again revoked petitioner's special parole based on the violations listed in the warrant. None of the time petitioner spent on special parole was credited, but he was credited with the time that he had been in custody. Petitioner's federal sentence will be completed on June 3, 1998.

Petitioner filed this petition for writ of habeas corpus in this Court on November 8, 1996, during his state prison term for the April 1, 1995 offenses. At that time petitioner was in custody of the New York Department of Corrections in East Elmhurst, New York.

Petitioner objects to the Commission's November 21, 1992 decision to revoke his parole, contending that

his regular parole expired on April 12, 1984, as originally scheduled, rather than on June 3, 1998. He contends that the Parole Commission had no jurisdiction to revoke his parole after his term of sentence had expired, or to summon him to appear in after his term of parole had expired. He also contends that his Fifth and Eighth Amendment rights have been violated by the Parole Commission because he is being forced to serve time that he has already served through being on parole, and because he has suffered emotionally.

I

The Court will first consider whether it has jurisdiction over this petition. Petitioner has been "in custody" within the meaning of 28 U.S.C. § 2241 during the entirety of his federal sentence, as well as during his term of parole. See Jones v. Cunningham, 371 U.S. 236, 242, 83 S. Ct. 373, 377 (1963). Even during the various state sentences that petitioner has served, he remained subject to the supervision of the Parole Commission. The warden of the state facility in

which petitioner was housed at the time that his petition was filed, named as the defendant in this action, acted as the agent of the Parole Commission by holding the petitioner pursuant to the Commissioner's warrant. See Frazier v. Wilkinson, 842 F.2d 42, 44 (2d Cir. 1988). Consequently, petitioner is eligible under 28 U.S.C. § 2241 to seek habeas corpus in federal court.

Petitioner is presently in federal custody at the Metropolitan Correctional Center located in the Southern District of New York. He remains under the supervision of the Probation Office of the United States District Court, Southern District of New York. But at the time that petitioner filed this petition, he was housed by the New York Department of Corrections in East Elmhurst, New York located in the Eastern District of New York. Jurisdiction over this petition in the Eastern District New York is proper. Ahrens v. Clark, 355 U.S. 188, 68 S. Ct. 1443 (1948).

## II

Petitioner argues that the Commission had no authority to revoke his parole on November 21, 1992 because his term of parole has expired on April 12, 1984.

Petitioner absconded from parole supervision on May 31, 1983. A person who absconds from parole, like an escapee from prison, is no longer considered to be serving his sentence. See Caballery v. U.S. Parole Comm'n, 673 F.2d 43, 46 (2d Cir. 1982). Petitioner's sentence of parole is tolled for the period during which he absconded. See id. Petitioner's claim that his term of parole expired on April 12, 1984 is without merit.

The Parole Commission's warrant issued on June 24, 1983 also served to bar the expiration of the petitioner's sentence. 28 C.F.R. § 2.44. The warrant maintained the Commission's jurisdiction to retake the petitioner "either before or after the normal expiration date of the sentence" and to conduct a revocation hearing after the date the sentence would

have expired in the absence of the warrant. Id. The Commission was empowered to execute the warrant against petitioner on July 23, 1992 and to revoke petitioner's parole on November 21, 1992.

### III

Petitioner argues that the revocation of his parole and his subsequent incarceration violates the double jeopardy clause and amounts to cruel and unusual punishment. The double jeopardy clause does not apply to parole proceedings or parole revocation. See Priore v. Nelson, 626 F.2d 211, 217 (2d Cir. 1980).

The revocation of petitioner's parole also does not constitute cruel and unusual punishment. When the Commission revoked petitioner's parole, it merely required him to serve the remainder of the original sentence imposed on him by the sentencing court. Incarceration for a sentence imposed within statutory limits does not demonstrate the "unnecessary and wanton infliction of pain" required to establish cruel and

unusual punishment. See Ingraham v. Wright, 430 U.S.  
651, 670, 97 S. Ct. 1401, 1412 (1977).

Plaintiff's petition is dismissed.

So ordered.

Dated: Brooklyn, New York  
May 8, 1998

Eugene H. Nickerson  
Eugene H. Nickerson, U.S.D.J.